Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of Local Zoning	)	IB Docket No. 95-59
of Satellite Earth Stations	)	DA 91-577
	)	45-DSS-MISC-93

To: The Commission

REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR PARTNERS L.P. ("PRIMESTAR"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits its reply to the comments filed in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION

While supporting the pro-consumer, pro-competitive policies articulated in the Commission's Order, PRIMESTAR, like many other commenters in this proceeding, disagrees that the final rule adopted in the Order fulfills the

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1 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, FCC 96-78 (released March 11, 1996) ("Order" or "Further NPRM").

Commission's obligation under Section 207 of the 1996 Telecommunications Act.[2] The record in this proceeding supports the adoption of a flat, or per se rule of preemption, rather than a presumption of preemption, of local governmental restrictions on all satellite antennas of 1.0 meter or less in diameter. In addition, the record affirms the Commission's conclusion that a per se preemption should be extended to nongovernmental or quasi-public restrictions. Finally, the Commission must commence immediately to exercise its exclusive jurisdiction over satellite antenna regulations, restrictions, and disputes.

II. THERE EXISTS NO COMPELLING BASIS FOR RETAINING ANY DEGREE OF LOCAL CONTROL OVER THE INSTALLATION AND USE OF SMALL DTH ANTENNAS

Section 207 of the 1996 Telecommunications Act charges the Commission with promoting two complementary federal interests: (a) to ensure that consumers have access to a broad range of video programming delivery services, including direct-to-home ("DTH") satellite services; and (b) to foster full and fair competition among different types of video programming delivery services. Many of the local organizations commenting in this proceeding, whether governmental, quasi-public or private, would frustrate these objectives by maintaining unnecessary and burdensome zoning and land-use restrictions involving satellite antennas, thus

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Telecommunications Act")

reducing the range of video programming delivery services available to consumers.

In general, the commenting localities attempt to characterize the Commission's preemption of local restrictions on satellite antenna deployment and use as more expansive than was intended by Congress.[3] These commenters make emotional appeals to the Commission, predicting that the Commission's rule would eliminate all local safety regulation and would endanger the lives of the citizenry. Some commenters resort to the absurd in defense of this position, suggesting that, without local regulation, gusts of wind will turn small satellite dishes into flying saucers, and hypothesizing that homeowners might start installing satellite dishes on sidewalks.[4] Both municipalities and community associations suggest that the installation and use of satellite dishes should be subject to local control for a variety of reasons, among them economic, safety, and aesthetic issues, and question the Commission's legal authority to adopt the proposed rule because land use is traditionally a local concern.[5] As demonstrated below, the extreme positions advanced by

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3 See, e.g., Comments of Silverman & Schild at 2; Comments of Local Communities at 4.

4 Comments of Local Communities at 13.

5 See generally Comments of National Apartment Assoc., et al.

governmental, quasi-public and private land use regulators have no merit in law or fact.

A. The Commission Has The Legal Authority to Preempt Local Zoning Regulation of Satellite Antennas

A number or commenters challenge the Commission's authority to preempt local zoning regulation of satellite earth station antennas. As the Commission's Order states, however, the Commission has a sound legal basis for preempting state and local government regulation of satellite dishes, and the Commission's authority, even before the enactment of Section 207 of the 1996 Telecommunications Act, has been upheld by the courts.[6] Quite simply, as a general matter, the Commission has regulatory authority over satellite communications services and thus authority over access to such services across the United States.

Further, Sections 205 and 207 of the 1996 Telecommunications Act confer specific jurisdiction and authority on the Commission. These sections evidence Congress's recognition that the federal interests at stake here warrant preemption of inconsistent state and local

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6 See Order at ¶¶ 11-13; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

regulations, even though those regulations address a traditionally local subject such as land use.[7]

B. The Record Provides No Evidence of Local Interests Sufficient to Outweigh the Substantial Federal Interest Favoring Preemption

The record in this proceeding is replete with examples of local authorities who give no weight whatsoever to the federal interest in ensuring that consumers have access to competitive DTH providers. Moreover, despite the massive number of filings by local authorities and private land use concerns, there are no realistic examples of countervailing local interest sufficient to overshadow the federal interest in preemption. Municipalities and community associations challenge the Commission's proposed rules by emphasizing the health, safety, aesthetic and property value concerns allegedly resulting from unregulated installation, regardless of antenna size. These commenters, however, fail to provide any proof or evidence that such concerns apply to antennas of 1.0 meter or less.

Both the Commission and Congress have indicated that aesthetic concerns are entitled to little weight vis a vis the federal interest in assuring consumers access to a broad

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[7] See also H.R. Rep. No. 204, 104th Cong., 1st Sess. at 123 (1995).

range of video programming delivery services.[8] In any event, small antennas do not raise the aesthetic concerns that have prompted many communities to restrict installation of larger C-band antennas.

Moreover, localities are hard-pressed to find health or safety reasons for maintaining control over the deployment and use of small DTH satellite dishes. As DirecTV points out, there simply are no health concerns regarding satellite antennas other than radiofrequency ("RF") emissions, which do not apply at all to receive-only DTH antennas.[9] Similarly, safety risks are negligible. With respect to antennas used by PRIMESTAR customers, PRIMESTAR's distributors utilize professional installation which minimizes or eliminates any safety concerns. Health and safety issues raised by local authorities are inapplicable to smaller, receive-only antennas. Therefore, preemption of these regulations and covenants is appropriate and is fully justified.

III. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES A PER SE PREEMPTION OF PUBLIC AND PRIVATE RESTRICTIONS ON SMALL DTH ANTENNAS

In its initial comments in this proceeding, PRIMESTAR urged the Commission to adopt a prospective approach to preemption of governmental and nongovernmental restrictions

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8 Further NPRM at ¶ 62; H.R. Rep. No 204, 104th Cong., 1st Sess. 124 (1995).

9 Comments of DirecTV at 14.

on small DTH antennas. This system would preempt any local restrictions on antennas of 1.0 meter or less unless the promulgating entity could justify a waiver of the rule based on a compelling health or safety reason. The record in this proceeding amply supports adoption of such an approach.

The rule promulgated in the Commission's Order established a rebuttable presumption that local regulation of small satellite antennas was unreasonable, thereby leaving open the ability of local governments to attempt to justify continued regulation. Based on the content of the comments filed in this proceeding, it is clear that such an approach would indeed allow "the camel's nose in the tent," and result in thousands of requests being filed by local governments seeking to maintain limitations on the installation of antennas of 1.0 meter or less, a result which is neither desirable nor necessary.

The language of Section 207 of the 1996 Telecommunications Act is clear and unequivocal. The House Committee Report explains that the intent of the provision is to preempt enforcement of restrictions "that prevent the use of antennae designed for . . . receipt of DBS services."[10] Congress, however, did not envision that the Commission would exercise its authority to balance the federal interest in competition among video programming delivery services against local interests in zoning.

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10 H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. at 123-124.

Had Congress intended the Commission to stop short of a per se preemption of local law and regulation affecting small DTH antennas, it would have so indicated. As USSB notes, "the 1996 Act is replete with specific examples of Congress conferring jurisdiction on states or retaining federal jurisdiction as it deemed appropriate."[11] In contrast, as DirecTV points out, "Section 207 contains no accommodations to local interests."[12] The rebuttable presumptions procedure, therefore, conflicts with Congress's intent and the directive of Section 207.

As a number of commenters have counseled, the revised rule has the unintended consequence of providing DTH subscribers with far less than complete protection from regulatory burdens.[13] By providing the opportunity for rebuttal of the presumption of preemption, the rule permits DTH subscribers to be subjected to procedural and regulatory burdens not faced by the customers of other multichannel video programming distributors that use wire transmission systems. Moreover, the system of presumptions and rebuttals provides little certainty to consumers, who will suffer lingering doubts that a purchased and installed DTH

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11 Comments of USSB at 6.

12 Comments of DirecTV at 7.

13 See, e.g., Comments of Satellite Broadcasting Association of America ("SBCA") at 12-13; Comments of AlphaStar Television Network, Inc. ("AlphaStar") at 4-5.

receiving antenna may ultimately be rendered unusable by a successful municipal challenge. PRIMESTAR agrees with DirecTV's assertion that the mere threat of litigation will "result in the de facto enforcement of local satellite regulations," as consumers will be loath to spend the money or take the time to defend their rights.[14] Knowledge of the possibility that subscription to a DTH service could place a consumer square in the middle of a legal morass would undoubtedly stifle any decision to utilize satellite services for home entertainment. Instead, as the SBCA concludes, consumers will opt for "easier" services, i.e., cable.[15]

To ensure that unique local concerns are accommodated, and as advocated by a substantial number of commenters,[16] the per se preemption approach could be accompanied by a waiver procedure. The Commission should delineate clear standards and procedures for waiver requests, and place such requests on public notice with an opportunity for comment.

As the SBCA indicates, the Commission should craft rules which obviate the need for unnecessary legal battles

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14 Comments of DirecTV at 5; see also Comments of AlphaStar at 4.

15 Comments of SBCA at 3.

16 See, e.g., Comments of SBCA at 10-14; Comments of Consumer Electronics Manufacturers Association at 6-7.

over the "privilege" of obtaining satellite services.[17] Only by adopting a per se preemption of all local regulation of small DTH antennas can the Commission foster parity between DTH services and other distribution technologies, as intended by Congress in Section 207 of the 1996 Telecommunications Act.

The same approach should apply to private, nongovernmental restrictions. While private organizations have joined forces in this proceeding to argue against such a preemption, their attempts to find loopholes in Section 207, by attributing various meanings to the word "impair,"[18] are unpersuasive. Congressional intent in this regard is clear -- "existing regulations, including . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."[19] Preemption of such restrictions is essential to effectuate the federal interest in ensuring consumer access to satellite signals from small antennas.

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17 Comments of SBCA at 12. In a recent example, a New Jersey couple subscribed to PRIMESTAR, primarily for its unique ability to deliver "TV Japan." A New Jersey municipal official observed the installation taking place and told the installers that the homeowner needed a permit. When advised of this, the homeowners were so intimidated that they cancelled their subscription and ordered the installers to immediately cease the installation and remove their equipment.

18 See, e.g., Comments of Silverman & Schild at 3; Comments of Community Associations Institute at 9.

19 1996 Telecommunications Act at § 207.

The comments filed by the SBCA graphically illustrate how satellite consumers, both potential and existing, are "plagued by restrictive covenants and homeowners' association rules that are equal or broader in scope and force to their government-imposed counterpart -- zoning ordinances -- in impairing consumers' ability to receive satellite signals."[20] Challenging homeowners' association ("HOA") rules in court presents the same time-consuming, lengthy, expensive, and unreliable means of obtaining relief as presented by governmental restrictions. Accordingly, to implement the directives of the 1996 Telecommunications Act and to enable homeowners to receive DTH signals without protracted disputes with their homeowners' associations, the Commission should extend a per se preemption to private or quasi-public restrictions that affect the use of small DTH antennas.

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[20] Comments of SBCA at 14-15. Based on the comments filed in this proceeding, it is readily apparent that if HOA-type rules are preempted, as mandated by Congress, small groups will exert pressure upon states and localities to further restrict the use and deployment of small satellite dishes. Given this eventuality, the Commission has all the more reason to adopt a waiver-only approach for preemption of local governmental restrictions. Only a per se preemption will reduce the risk of endless litigation and help states and localities to resist pressure from HOA groups, consistent with Congressional intent.

IV. THE PROTECTIONS OF SECTION 207 SHOULD NOT BE CONFINED TO ANTENNAS USED WITH PART 100 DBS SYSTEMS

In its initial comments in this proceeding, PRIMESTAR concurred with the Commission's tentative conclusion that rules mandating preemption of local regulation of small antennas should include not only antennas utilized by services that are technically classified as DBS, but also medium power DTH services, such as those offered by PRIMESTAR, that are technically part of the fixed satellite service. Many of the commenters in this proceeding support this conclusion.[21]

A handful of commenters, however, suggest that, in adopting Section 207, Congress "intended to focus on services rather than size."[22] These commenters urge the Commission to limit its rule, if adopted, to antennas for which the underlying service is technically classified as DBS, and/or which measure 18 inches in diameter or less. Some also maintain that by crafting the rule to apply only to "DBS" antennas, the Commission will encourage the industry to "make its dishes as inconspicuous as possible."[23] PRIMESTAR disagrees.

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21 See, e.g., Comments of SBCA at 13; Comments of Consumer Electronics Manufacturers Association at 3; Comments of AlphaStar at 4.

22 Comments of Local Communities at 14; see also Comments of Silverman & Schild at 2.

23 Comments of Local Communities at 16; Comments of Silverman & Schild at 3.

The language contained in Section 207 specifically refers to "direct broadcast satellite services." There is no indication that Congress intended that term to be restricted to satellite services utilizing only high power DBS satellites under Part 100 of the Commission's rules. In fact, when Congress previously defined "provider of direct broadcast satellite services," it did so by referring both to DBS satellite services regulated under Part 100 of the Commission's rules and to satellite services "using a Ku-band fixed satellite service system." 47 U.S.C § 335(b)(5)(a). Thus, it is clear that "direct broadcast satellite services" refers both to "DBS" and to medium power Ku-band DTH services that employ small antennas.

The legislative history of the 1996 Telecommunications Act also stresses that Congress intended antenna size to be a major variable to be considered in crafting preemption rules.[24] As the Consumer Electronics Manufacturers Association points out, "given the pro-consumer and pro-competitive emphasis of Section 207, Congress clearly intended that [medium power DTH antennas] should be included in the definition of DBS for purposes of interpreting [the legislation]."[25]

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24 H.R. Rep. No. 204, 104th Congress, 1st Sess. 123-24 (1995).

25 Comments of Consumer Electronics Manufacturers Association at 3, 4 n.7.

The limitation of Section 207 to Part 100 DBS services would place PRIMESTAR, and other medium power Ku-band DTH providers, such as Alphastar, at an obvious competitive disadvantage, subjecting them to burdensome local regulation which their competitors utilizing high-power DBS satellites would avoid. PRIMESTAR is a principal competitor of DirecTV, USSB and Echostar in the DTH service. Any limitation in the scope of preemption to Part 100 services, or a reduction in the antenna size that is covered by the preemption rule (from 1.0 meter to 24 inches, as suggested by the National Association of Counties et al. and others, for example),[26] would unfairly discriminate against PRIMESTAR's customers and the customers of other medium power DTH providers and provide competitors with an unjustified advantage. Such a result clearly would be contrary to Congress's stated intent of fostering competition.

The Commission should not be misled by the contention that the preemption of regulation of only the smallest antennas will encourage the DTH industry to make antennas as inconspicuous as possible. In PRIMESTAR's case, the competitive disadvantage it faces as a result of its medium power FSS satellites requiring the use of slightly larger receive dishes than those which receive high power DBS signals, provides all the marketplace incentives it needs to

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[26] Comments of National Association of Counties at 3-5; Comments of Silverman & Schild at 3.

move to smaller receive dishes. The Commission should not interfere with the workings of the marketplace in this regard, particularly where regulation would substantially favor certain DTH competitors over others without countervailing benefit.

V. THE FCC SHOULD EXERCISE ITS EXCLUSIVE JURISDICTION OVER SATELLITE SERVICES

PRIMESTAR concurs with the views of those commenters who urge that, to the extent the Commission decides to allow local authorities to rebut the presumption against the regulation of smaller DTH antennas, it must exercise its exclusive jurisdiction over DTH services and preclude initial judicial review of local satellite zoning regulations. Exclusive FCC jurisdiction will allow the Commission to enforce and interpret its own rule consistent with its policies and to reduce the procedural burdens on antenna owners.[27] Further, as DirecTV notes, allowing initial "judicial review divests the Commission of its exclusive jurisdiction over DTH satellite services granted in Section 205."[28]

Further, as USSB aptly states, "national uniform standards must be established if [DTH] service is to be available to all citizens on a nondiscriminatory basis."[29]

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27 Comments of DirecTV at 9.

28 Id.

29 Comments of USSB at 4.

National uniform standards developed by the Commission will encourage local jurisdictions to impose and enforce rules consistent with Commission decisions, thereby reducing the quantity of litigation which otherwise is likely to develop as local jurisdictions attempt to preserve restrictions on small DTH antennas under imaginative scenarios of self-interest.[30] The cost and delay of the local litigation process will favor those imposing zoning restrictions.

VI. CONCLUSION

The record in this proceeding is replete with examples of unreasonable height, location and lot size restrictions, expensive variance procedures, and screening and landscaping requirements, all of which have burdened satellite communications since their inception. Pursuant to Section 207 of the 1996 Telecommunications Act, the Commission has an obligation to lift these obstacles and to assert its exclusive jurisdiction over satellite services, thus ensuring that consumers have the same access to DTH satellite services as they do to other video distribution services, as intended by Congress.

To that end, the Commission should adopt a waiver-only approach to preemption of local regulation of the small satellite antennas governed by paragraph (b)(1) of its rule (i.e., any antenna of 1.0 meter or less in diameter).

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30 Comments of SBCA at 6-9.

Further, the Commission should adopt its proposed rule of a per se preemption of private, nongovernmental restrictions that impair a consumer's ability to receive satellite signals.

Respectfully submitted,

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May 6, 1996

CERTIFICATE OF SERVICE

I, Lynne M. Hensley, a secretary with the law firm of Reed Smith Shaw & McClay, hereby certify that a copy of the foregoing **REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.** was served by United States mail, first-class, postage prepaid, on this 6th day of May, 1996, on the following persons at the addresses listed below:

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